85-1983

Supreme Court, U.S.
FILED
JUN 2 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. -

SUPREME COURT OF THE UNITED STATES

October Term, 1985

SANTOS CARRION,

Petitioner,

v.

THE STATE OF CALIFORNIA,

Respondent,

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT DIVISION TWO

PETITION FOR WRIT OF CERTIORARI

LUIS R. PALACIOS, Esq.
444 N. Arrowhead Ave., #105
San Bernardino, CA 92401
(714) 889-8436
Attorney for Petitioner
Counsel of Record

QUESTIONS PRESENTED:

1. Whether Due Process rights were violated when conviction rests on identification procedure that is so impermissibly suggestive as to be likely of irreparable misidentification.

2. Whether insufficiency of evidence is grounds for granting new trial.

3. Whether a new trial should be granted where verdict is inconsistent and not supported by the facts.

4. Whether a new trial should be granted when verdict has been decided by any means other than fair expression of opinion of all the jurors, (due to juror on voir dire not disclosing mental incompetence).

5. Whether a new trial should be granted when jury has been guilty of any misconduct by which fair and due consideration of the case has been prevented, (ditto as No. 4).

6. Whether denial of reasonable exercise of peremptory challenges through concealment of facts by a juror is denial of fundamental

constitutional right to trial by jury (ditto as No. 4).

7. Whether the right to trial before competent jurors is a fundamental, constitutional right, (ditto as No. 4.)

8. Whether acquiescence with the majority by one juror constitutes violation of fundamental constitutional right to individual opinion of each juror, (ditto as No. 4).

TABLE OF CONTENTS

	Page No.
Prayer for Relief	1
Opinions below	2
Jurisdiction	3
Constitutional and Statutory Provisions involved	4
Statement of the Case	5
Reasons for Granting the Petition	15
Conclusion	55
Appendix i	0
Appendix ii	24
Appendix iv	26

TABLE OF AUTHORITIES

	Page No.
U.S. Const. Amend. IV	3, 30, 55
U.S. Const. Amend. V	46
U.S. Const. Amend. VI	5
U.S. Const. Amend. XIV	3, 30, 40, 55
Cal. Const. Art. I, Sec. 7	53
Cal. Const. Art. I, Sec. 13	5
Cal. Const. Art. I, Sec. 15	5
Cal. Const. Art. I, Sec. 16	5
Cal. Pen. Code Sec. 211	5, 32
Cal. Pen. Code Sec.245(a)	5
Cal. Pen. Code Sec. 995	5
Cal. Pen. Code Sec. 1118.1	5
Cal. Pen. Code Sec. 1119	5
Cal. Pen. Code Sec. 1181	5
Cal. Pen. Code Sec. 1181(3)	43
Cal. Pen. Code Sec. 1181(4)	35, 37
Cal. Pen. Code Sec. 1181(6)	31
Cal. Pen. Code Sec. 12022b	5
Cal. Ev. Code Sec. 402	5, 25, 26
Cal. Ev. Code Sec. 403	5, 6, 25, 26
Cal. Ev. Code Sec. 1150(a)	39, 42
Birt v. Superior Court (1973) 34 Cal.App. 3d 934	33
People v. Baumgartner 166 Cal. App. 2d 103, 107, 108	53
Church v. Capital Freight Lines (1956) 141 CA2d 246	49
People v. Carter (1975) 46 Cal.App.3d 263	24
People v. Citrino (1970) 11 Cal.App.3d 784	24
People v. Caruso (1968) 68 Cal.2d 183	26
People v. Castaldia (1959) 51 Cal.2d 569	41
Dunn v. United States (1931) 284 U.S. 390	35
People v. Diaz (1984) 152 Cal.App.3d 926	46
People v. Fair (supra)	43
Foy v. New York (1947) 332 U.S. 261, 288	42

Cont'd

Page No.

People v. Galloway (1927) 202 Cal. 81 . . . . . 45, 48, 51
People v. Horowitz (1933) 131 CalApp. Supp. 791 34
People v. Hutchinson (1969) 71 Cal.2d 342 3
Jackson v. Virginia (1979) 443 U.S. 307;61 L.Ed.2d 560 18
People v. Mulqueen (1970) 9 Cal.App.3d 532 33
People v. Martinez (1969) 274 Cal.App.2d 170 33
Neil v. Biggers (1972) 409 U.S. 188, 189;34 L.Ed2d 401 19
Pointed v. United States (1894) 151 U.S. 396, 408 48
People v. Poindexter (1967) 255 Cal.App.2d 566 31
Simmons v. United States (1968) 390 U.S. 377;19 L.Ed2d 1247 . . . . . 18, 19
Stoval v. Denno (1967) 388 U.S. 293;18 L.Ed2d 1199 26
Shipley v. Permanente Hospital 127 Cal.App.2d 417 51
People v. Serrato (1973) 9 Cal.3d 753 18
People v. Scott (1978) 21 C3d 289, 290 30
People v. Smith (1931) 117 Cal.App. 530 35
People v. Superior Court (1968) 67 C2d 929 53
Weathers v. Kaiser Foundation Hospital (1971) 5 Cal.3d 98 47
People v. Ware (1978) 78 Cal.App.3d 822 19
People v. Williams (1973) 9 Cal.App.2d 24 24
People v. Wheeler (1978) 22 Cal.3d 258 258 48
People v. Wilt 173 Cal. 477, 486 . . 53
Wong v. United States (1963) 371 U.S. 471;83 S.Ct. 407 34
Witkin Cal. Crim. Proc., Section 553 36
Cal. Proc. Trial, Section 99 37

No.

SUPREME COURT OF THE UNITED STATES

October Term, 1985

SANTOS CARRION,

Petitioner,

vs.

THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FOURTH APPELLATE DISTRICT DIVISON TWO

Petitioner, SANTOS CARRION, earnestly, but respectfully prays that a Writ of Certiorari issue to review the majority opinion of the California Court of Appeal which affirmed the Superior Court's conviction, holding that: the on-the-scene show-up was not impermissibly suggestive and that Petitioner was not denied his right to due process; there was sufficient evidence to satisfy the required elements of the Cal. Pen.Code Section 211; inconsistency of verdicts re co-

defendant and petitioner is not necessarily an indication of disregard of the law or a compromise, or exercise of power which the jury has no right to exercise; a juror's affidavit stating she did not disclose at Voir Dire that she is seeing a psychologist because she can not assert herself, and that she would have voted not guilty but for other juror's pressure is inadmissible and does not amount to denial of right to fair expression of opinion of all the jurors; or misconduct by which a fair and due consideration of the case has been prevented, or denial of right to exercise peremptory challenges, or denial of right to mentally competent jurors, or denial of right to independent judgment of each juror, and therefore a denial of Constitutional Due Process and Equal Protection.

OPINIONS BELOW

The opinion of the Cal. Court of Appeal was ordered not for publication (App. i, infra). The California Supreme Court order

denying Petition for Review is included herein (App. ii, infra).

JURISDICTION

Petitioner invokes the jurisdiction of this Honorable Court under 28 U.S.C. Sec. 1257 (3) on the grounds that : the conviction by the Superior Court, affirmed by the January 15, 1986 Court of Appeal opinion is contrary to law because the detention, identification, and subsequent arrest of the Petitioner were illegal as violation of Petitioner's Fourth Amendment and Fourteenth Amendment Due Process rights; all the evidence derived therefrom is inadmissible by the Fourth and Fourteenth Amendment, the Exclusionary Rule and as "fruit of the poisonous tree"; the conviction based on inadmissible, insufficient evidence and the inconsistent verdicts and subsequent denial of request for new trial violates the Petitioner's Due Process rights to a fair trial; retention of the jury's verdict, notwithstanding evidence of the prospective juror's

affidavit reflecting non-disclosure of existing mental disabilities violates Petitioner's Sixth Amendment rights to trial by jury, Fifth and Fourteenth Amendment's Due Process clauses rights to a fair trial by an impartial jury, and the Fourteenth Amendment's Equal Protection clause because retention of this juror's vote in effect nullifies California's requirement for unanimous verdicts in criminal cases.

The California Court of Appeal entered its order rejecting petitioner's claim on January 15, 1986. A timely Petition for Review was filed in the Supreme Court of the State of California, which denied hearing on the Petition on May 7, 1986 (App. ii, infra.)

The instant Petition for Writ of Certiorari is filed within 60 days of that Order.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

As per U.S.S.C. Rule 21.1 (f) the constitutional provisions and statutes which this case involves are set forth in relevant part

in (App. iv), which includes:

U.S. Const. Amend. IV
U.S. Const. Amend. V
U.S. Const. Amend. VI
U.S. Const. Amend. XIV
Cal. Const. Art. I, Sec. 7
Cal. Const. Art. I, Sec. 15
Cal. Const. Art. I, Sec. 16
Cal. Pen. Code Sec. 211
Cal. Pen. Code Sec. 245(a)
Cal. Pen. Code Sec. 995
Cal. Pen. Code Sec. 1118.1
Cal. Pen. Code Sec. 1119
Cal. Pen. Code Sec. 1181
Cal. Pen. Code Sec. 1181(3)
Cal. Pen. Code Sec. 1181(4)
Cal. Pen. Code Sec. 1181(6)
Cal. Pen. Code Sec. 12022(b)
Cal. Ev. Code Sec. 402
Cal. Ev. Code Sec. 403
Cal. Ev. Code Sec. 1150
Cal. Ev. Code Sec. 1150(a)

STATEMENT OF CASE

This is a criminal action wherein appellant was convicted of violation of Cal. Pen. Code Sec. 211, Robbery, with a Cal. Pen. Code Sec. 12022b Used a Deadly Weapon allegation, and Cal Pen. Code Sec. 245(a), Assault with a Deadly Weapon. At the trial level, timely Cal. Pen. Code Sec. 995 Motion to Set Aside the Information, Cal. Ev. Code Sec. 402-403 Motion for Hearing re Admissibility of Preferred Evidence, Cal. Pen. Code Sec. 1119

Motion for Jury View of the Scene, Cal. Pen. Code Sec. 1118.1 Motion for Acquittal were made and denied. After the verdict, juror misconduct was discovered and a timely Cal. Pen. Code Sec. 1181 Motion for New Trial was made and denied. Alleging prejudicial per se errors had been committed, requiring automatic reversal, Petitioner filed a timely Appeal, and the Cal. Court of Appeal entered its order rejecting Petitioner's claim on January 15, 1986. A Petition for Review was filed in the Cal. Supreme Court and it was denied on May 7, 1986. The instant Petition is filed within 60 days of that order.

SUMMARY OF RELEVANT FACTS

Legend: RT = Reporter's Transcript & Page No.
CT = Clerk's Transcript and Page No.

At the Cal. Ev. Code Sec. 403 Motion Hearing, the victim Jesse Solis testified that: On June 24, 1983, abut 2:30 A.M. he was sleeping in his van, parked in a Colton shopping center parking lot (RT 461); he was awakened by sounds of yanking and pushing the back door and a voice saying, "open up"

(RT 462); and threats of blowing the van up (RT 463); he opened a small corner of a window curtain (RT 464) and saw nine to ten people out there (RT 470) and the one that was pulling the door and yelling had a baseball hat with writing which said, "Hells Angels" (RT 471); and he had a black jacket with no writing (RT 471, 472); he also looked out the two rear passenger door windows and saw two others crouched down next to the door (RT 473); who later moved around to the front hood (RT 475, 476); at some point, the back doors opened up and the one by the back doors was coming in with a knife in his left hand saying, "Come here" (RT 479); as the guy climbed into the van, Solis opened the rear passenger doors and ran out (RT 481). At the same Hearing, he pointed to Petitioner as the one that opened the back door (RT 478) and defendants Solis (no kin to victim Solis) and Herrera as the two by the side doors (RT 474). He also identified Exhibit #1 as being the knife and said he recognized it by a pro-

trusion (RT 479) and Exhibit #2 as the hat the guy at the back door was wearing (RT 483). He testified that: the lights in the parking lot were not on at the time of the incident, he had no lights inside the van, and he did not have a flashlight (RT 498); all the windows except the windshield and front doors were covered with taped cloth (RT 501, 513); he ran from the an across the street from the parking lot to a Chief's Auto Parts store (RT 484); no on chased him when he ran from the van (RT 504); at Chief's Auto he told the deskman to call the police, "there are some bikers after me" and about ten minutes later (RT 484) when the police came, the officer "asked me to see if I could identify these people" (RT 484); "I pointed to them, that was my van over there and they had, you know, robbed it " (RT 485). I told him there were a couple of bikers out there (RT 486, 536); he did not see the people go from the van to the bar; from Chief's Auto he could not see their faces or their clothing (RT

506, 509); when the first officer arrived, I told him there was a couple of these guys after me, they robbed my van (RT 506); and he saw the officer go into the bar while he waited at Chief's for another officer to take him there (RT 486) and the officer just went across the street and flashed the lights at them; he described the people to the officers like one was wearing a hat, the other was wearing a jacket, and one had a beard, and he told them they were bikers (RT 510, 511, 540); when he got to the bar, the police had their spotlights flashing at the bar and the people, and he saw Petitioner by a motorcycle and he told the officer he was one of the fellows, and he saw defendant Solis by another motorcycle and identified him (RT 487) and also identified Herrera coming out of the bar (RT 488); at some point he went back to the van where they (the police) were taking pictures and missing were a tape recorder, wallet, money, and a ring (RT 488) and there were clothes all over the street

(RT 489).

Then Officer Filson of San Bernardino Police Department, the first officer to respond, testified that: on first contact at Chief's, Solis said that several bikers tried to break into his van, one had a knife, they tried to rob him (RT 547); Solis pointed toward the bar and pointed to several people that were walking out of the bar, he said they were the ones that robbed me, he told Solis to wait there for another unit and he drove over to the bar and contacted the people outside the bar (RT 548). Petitioner had blue jeans and "Amigos" club colors denim jacket, but the officer did not recall if Petitioner had a hat (RT 549); Defendant Solis was dressed the same way. The officer told them, there had been a robbery and wanted them to stand by and he stayed with Petitioner and Defendant Solis until the other unit arrived (RT 550); there is a gap of five months between the incident and the time the officer wrote his

report (RT 553); Chief's Auto is 250 feet (approximately half a city block) from the bar, from Chief's Auto, he could not see facial features of the people at the bar (RT 554,555) but you could tell they appeared to be wearing jackets or vests (RT 555); when he went to the bar, he focused on the ones that resembled biker types (RT 556) but there were other people there (RT 557); Solis did not give him a description of what, in his mind, was a biker (RT 557); he stayed with the individuals at the bar three to five minutes before the other officers arrived (RT 560); he testified they were free to leave, but yes, he told them to stand and wait until the Colton Police arrived (RT 561).

At the Hearing, Officer Paul of Colton Police Department, testified that: when he contacted Solis at Chief's Auto, Solis said he had been awakened while asleep at his van; several subjects pounding on the van robbed him at knife point (RT 564); some

personal effects had been taken (RT 575); Solis pointed across and said they were over there and he saw a San Bernardino unit detaining some subjects by some motorcycles; from Chief's Auto he could not tell if anybody had long or short hair, but he could tell some had jackets (RT 576); and Officer Gillespie arrived to take Solis to the bar (RT 565). Upon arrival, he obtained (sic) the San Bernardino officer and Solis pointed to two subjects (Petitioner and Defendant Solis) that were standing in front of their motorcycles (RT 568); he asked Solis how he knew it was him (referring to Petitioner) and Solis said due to the hat he was wearing (RT 569) and the emblem on his hat, as well as that the subject had a deep tone voice; however, the officer stated that Petitioner had not talked in front of Solis, nor did Petitioner talk later on, according to his knowledge (RT 570,579); as to Defendant Solis, Solis recognized him by the jacket

and the long hair (RT 570) and Defendant Herrera by the tee shirt as well as the goatee (RT 571).

Defendant Solis testified that: when they were leaving the bar, they were contacted outside the bar by the officer who told them they were to wait and that the officer took his driver's license and he felt they were not free to go (RT 589). The reason why he waited because the officer told him to wait there (RT 590).

At the end of that testimony, the defense argued that the arrest/detention and the subsequent identification were illegal (RT 593-597). The District Attorney submitted the matter without argument (RT 597; 11-14). Then, the Court apparently bothered by the evidence, at first ruled that the arrest was illegal (RT 598; 3-5) but then said it was legal (RT 598; 13). The defense continued in efforts to show that the identification was impermissibly suggestive requesting a Cal. Pen. Code Sec. 1119 view

of the van and the scene (RT 598; 24-26) (RT 599). However, the District Attorney argued that the van was not working and that there were difficulties with a night view. The Court took the matter under submission (RT 601; 14) and later denied it.

During Voir Dire, Juror Number 7, gave responses that did not raise reasons for challenges for cause or peremptories.

The trial was held with the District Attorney presenting basically the same evidence he put on at the 403 Hearing.

The defense made a Cal. Pen. Code Sec. 1118.1 Motion for acquittal on the basis of insufficient evidence (RT 923-927). The Court was troubled by the issues raised, but eventually denied the Motion (RT 949-950).

On the morning of April 17, 1984, the jury retired to deliberate. On the following day, they requested "the District Attorney's examination of Solis' description of defendants around the van" (RT 1348; 6-15) and the

afternoon of April 18, 1984, they came in with their verdict (RT 1349; 14-15). The jury was polled.

On May 24, 1984, Petitioner's attorney filed a Motion for a new trial on the basis of a Declaration signed by Barbara Tallman, No. 7, where she admits to untrue answers on Voir Dire.

The Motion for new trial was denied and the timely Notice of Appeal followed. The Appellate Court in a written opinion found against the Petitioner and affirmed the judgment. (App. i) The California Supreme Court denied a Petition for review (App ii). This Petition for Certiorari followed.

REASONS FOR GRANTING THE PETITION

This Petition for Certiorari provides the opportunity for this Honorable Court to settle important questions of law and is necessary to secure uniformity of decisions.

The first issue deals with an "in-the-field" show up and identification, a con-

stantly recurring problematic situation. It is readily understood that this is an efficient procedure for law enforcement as an expedient, economical, efficient method of identifying and apprehending criminals and for the accused as an expedient means of being quickly exonerated. However, problems arise because of ignorance of the frailties of the human senses, or because of plain intentional or negligent misuse, or abuse. In this respect, Petitioner herein believes that the law is fairly well settled that identifications based on items of clothing ar highly suspect, particularly when they are coupled with a highly suggestive scenario and procedures. However, the problems in the field continue to recur and the diverse decisions being handed by the courts reflect that some refinement of the rules are needed.

Issues two and three are collateral to the first issue.

Most important herein, points four

through eight in this Petition raise issues of juror misconduct, and competency, and the antiquated rules pertaining to restrictions on usage of jurors affidavits. The state of these antiquated rules and their often pernicious impact has not been fully analyzed. It is earnestly hoped by Petitioner herein that Points IV through VIII are carefully scrutinized and analyzed along with the distinguished Appellate Court's opinion, and that careful deliberation will reveal that there is much ambiguity in this area that needs clarification.

It is Petitioner's opinion that both the identification and the juror's issues are of widespread interest. Because of this, it is expected that if this Honorable Court grants this Petition for Certiorari, the benefits of the Court's wise guidelines will be far reaching. With this in mind, the following Points and Authorities are submitted.

POINTS AND AUTHORITIES AND ARGUMENT

A DEFENDANT'S FEDERAL AND STATE DUE PROCESS

RIGHTS ARE VIOLATED WHEN A CONVICTION RESTS ON AN IDENTIFICATION PROCEDURE THAT IS SO IMPERMISSIBLY SUGGESTIVE AS TO GIVE RISE TO A VERY SUBSTANTIAL LIKELIHOOD OF IRREPARABLE MISIDENTIFICATION.

Due process requirements protect an accused against conviction except on proof beyond a reasonable doubt. People vs. Serrato (1973) 9Cal.3d 753, 766-767, and a verdict should be overturned if the record viewed as a whole and in the light most favorable to the judgment does not provide the substantial evidence to support the verdict. Jackson vs. Virginia (1979) 443 U.S. 307, 313-320; 61 L.Ed.2d 560.

One specific due process requirement was originally stated by the Court to be that police use only identification procedures which will produce fair identifications under the totality of the circumstances. Simmons vs. U.S. (1968) 390 U.S. 337,m 384; 19 L.Ed.2d 1247. Later the Court changed the emphasis to the overall reliability of

the identification evidence. In Neil vs. Biggers (1972) 409 U.S. 188, 189, the Court stated that "the factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." The Courts have concluded that the likelihood of misidentification is the real due process issue. Neil vs. Biggers id. at p. 189.

The present formulation of the due process standard used by the Federal and California Courts was set out in Simmons vs. U.S. supra, see also People vs. Ware (1978) 78 Cal.App.3d 822, 839.

Applying the Neil "test" to the instant

case, the witness herein testified that he was sound asleep and was suddenly awakened in the middle of the night by frightening noises (RT 461-463) in a van with no lights, which was parked in a lot without lights (RT 498). He hurriedly looked out through a tiny peephole in the rear window curtain (RT 464) and he saw what he describes as a group of "bikers", about nine or ten (RT 470), one of them pulling on the back door, yelling, "open up" and other threats (RT 462). He withdrew to the front of the van and saw two others by the right side doors (RT 473). Suddenly, the back doors opened up and the one by the back door started to come in with what he says was a knife in his left hand, yelling, "come here" (RT 479). He pushed the side doors open and ran out (RT 481). If one takes this sequence apart and considers the effects, it is reasonable to conclude that each one factor, taken alone, would be sufficient to create a state of mind that

would preclude careful observations.

The combinations of factors taken as whole has to lead to the conclusion that misidentification is highly probable because of lack of opportunity to view the perpetrator and because the witness' degree of attention had to be minimal. This is corroborated by Solis' scanty description. He said the one at the back door had a baseball hat with "Hells Angels" and a black jacket with no writing (RT 471-472). In fact, the hat Petitioner was wearing did not have "Hells Angels", but a Harley Davidson logo and his vest has big letters with "Los Amigos". This places serious doubts on the accuracy of the witness' description. Furthermore, later at the show-up in front of the bar, from about twenty feet away, he identified Petitioner as the one at the back of the van. The officer asked how do you know it's him, and he said by the hat and the emblem as well as the deep voice (RT 569-570, 579);

however, the officer said Solis had not even heard Petitioner's voice up to this time (RT 579). Thus, the witness displayed a high level of certainty; however, the certainty was placed on factors that just did not match or were not there, thereby demonstrating that the certainty displayed by the witness was as a result of a desire to point to someone to reach a conclusion to an understandably highly traumatic, highly humiliating experience. This is what the law is supposed to prevent, erroneously sending a man to prison on evidence that reflects misidentification. This is the evidence the District Attorney put on, and he did not sustain the required burden of preponderance of the evidence "that the identification was not overly suggestive and the clear and convincing" burden that the in-court identification was not tainted.

Furthermore, the officers unnecessarily used impermissiby suggestive procedures.

When Solis told the first officer that he had been robbed and pointed to the van, and then in another direction to the people coming out of the bar, the officer didn't ask what he meant by "biker" or for descriptions, or if he had seen the perpetrators go from the van to the bar. The officer just went to the bar, and detained the exiting bar patrons that, in his mind, were "bikers" by their motorcycles and put the lights on them. The patrons just cooperated and then Mr. Solis was brought over to view these people on the spotlight by their motorcycles. The scenario is so impermissibly suggestive that it is tantamount to the officer pointing a finger, saying, "this one and this one." With this kind of scenario, Solis identified Petitioner by a deep voice (that he had not heard), the hat, and the emblem (that was not what Solis had described).

The suggestive nature of an identification by clothing rather than features has

been addressed in People vs. Carter 46 CA3d 263, 265 (1975) 120 Cal.Rptr. 181. During a trial for robbery the defendant complained he was picked out of a photographic line-up as the only one wearing a turtleneck sweater. Although the Cal. Second District Court of Appeal reversed on the issue of incompetency of counsel, it commented that it independently found that the sole identifying factor of a turtleneck sweater worn by defendant in the group of photographs denied the defendant his due process right to a fair trial. Citing People vs. Williams 9 CA2d 24, 37 (1973) 106 Cal.Rptr. 622, 506, P2d 988, it stated the rule that once the "identification procedure is shown to be constitutionally infirm the prosecution must then establish by clear and convincing proof that the in-court identification is not tainted."

In an earlier robbery identification case (People vs. Citrino 11 CA3d 784 (1970)

90 Cal.Rptr. 80), the Cal. First District Court of Appeal reversed the conviction of the defendant who was picked out of a photographic line-up as the only one with long hair and glasses. The Court outlined the procedure of finding the preliminary fact (after defendant's Cal. Ev. Code Sec. 402, 403 Motions) that the identification evidence is admissible and not illegally obtained by being overly suggestive. The prosecution has the burden of showing this lack of suggestion by a preponderance of the evidence. Failing this, the Court must then find a second preliminary fact that a subsequent in-court identification was not tainted. Here the prosecution has the burden of proof by clear and convincing evidence. Any finding by the Court on these preliminary issues of fact can be reviewed to determine whether the trial court's findings are supported by substantial evidence or not.

In the leading case of People vs.

Caruso 68 C.2d 183, 189-190 (1968) 65 Cal. Rptr. 336, 436 P2d 336, the criteria is stated as not whether the previous identification was by photographs or by a line-up which became overly suggestive but rather that the suggestion itself, whether by clothing or facial hair, and glasses, was conducive to constitutionally irreparable mistaken identity which tainted the later identification (see Stoval vs. Denno 388 U.S. 293, 302, (1967) 18 L.ed. 2d 1199).

It is here that the Petitioner has been constitutionally irreparably damaged by a prior suggestive show-up identification by the victim. At the line-up in front of the bar, he was the only one displayed with a cap on and a knife sheath on his leg. No other persons were dressed like this and the police spotlights were directed to Petitioner (RT 487).

At the trial, moving for the defendant under Cal. Ev. Code Section 402-403, defense counsel obtained a hearing on the detention

and the suggestive nature of the line-up in front of the bar with the police spotlights on defendants (RT 420). And at the end of the hearing, the People submitted the matter without argument (RT 597; 11-14). The Court first said that arrest was illegal and the identification based on the arrest was...(RT 598; 3-7). Then the Court said it meant to say legal (RT 598; 15) and no other findings were made.

The obvious evil inherent in suggestive identification procedures is that a percipient witness loses credibility by the absence of an objective test, and can not recover it afterwards once led to believe that to change his or her mind would cause any defendant identified by him to go free.

As shown above, the identification fails the "Neil Test" and the procedures used were so unnecessarily impermissibly suggestive that constitutional, prejudicial per se error has been committed requiring

automatic reversal.

Petitioner herein recognizes that "in the field" show ups have been upheld. However the cases cited reflect that where identification is based on clothing alone (as in the instant case) the identification is highly suspect. Here at the field show-up the identification was not made on personal features but rather the identification was made on a knife (that anyone else could have been carrying), on a baseball hat (which did not have "Hells Angels" as previousy described by the witness, and which others had been wearing [RT Vol. V P1141; 1-5]), on a jacket that had "Los Amigos" writing (that had previously been described by the witness as with no writing), and on a deep voice (which the witness had not heard at the show-up). This reflects that the factors relied upon to identify the Petitioner were mistaken. This also is sufficient to strike the identification, but there is

more. The sudden awakening, in the middle of a highly traumatic situation, in a dark night, with no lights, and the fleeting, instantaneous nature of the victim's observations could only lead to erroneous impressions. Here again this is also documented by the erroneous descriptions discussed above. Combine this with the impermissibly suggestive procedures followed by the officers and one has to reach a conclusion that this identification should not have been admitted. The

The distinguished Fourth Appellate Court's opinion states this issue is precluded because it was not raised at trial, but it was. The Reporter's Transcript Index for Vol. III at Page i lines 7-8 refers to the identification being raised. The attorneys began raising the issues at Page 420; 6-8. Petitioner's attorney made specific remarks about the suggestiveness of the identification at Page 429; 3-12 and 20-26, and also at Page

430; 1-8. Further in People vs. Scott (1978) 21 C3d 289, 290, the California Supreme Court held that "an objection is sufficient if it fairly apprises the trial court of the issue it is being called upon to decide...In a criminal case, the objection will be deemed preserved if, despite inadequate phrasing, the record shows that the Court understood the issues presented." Herein the Court was obviously apprised and grappling with the problem (RT Vol.III P. 597; 15-26, and P. 598; 3-10). Thus under the totality of the circumstances, admission of the identification is a denial of the fundamental, Fourth and Fourteenth Amendments Constitutional rights of Due Process and equal protection, and the Federal Exclusionary Rule.

II

INSUFFICIENCY OF THE EVIDENCE TO SUSTAIN THE VERDICT IS GROUNDS FOR GRANTING NEW TRIAL.

"When a verdict has been rendered or a finding made against the defendant, the court may upon his application, grant a new trial, in the following cases only: When the verdict or finding is contrary to law or evidence . . . Cal. Pen. Code Sec. 1181[6].

The Petitioner herein was charged with the crime of Robbery. "Robbery is the felonious taking of personal property in the possession of another from his person or immediate presence, and against his will accomplished by means of force or fear." Cal. Pen. Code Sec. 211 (Emphasis added).

Herein there is no evidence to show that any property of Mr. Jesse Solis was taken from his person or from his immediate presence by the Petitioner herein, or by anyone (See People v. Poindexter (1967) 255 CA2d 566, 568-569). In fact, it wasn't until he returned to his van long after the events took place that he discovered any property missing. Nothing was found in the

possession of the Petitioner or any of the accused. (See People v. Mulqueen (1970) 9 CA3d 532, 542-543). Nothing was moved by the victim or any alleged accomplices or persons acting on order. (See People v. Martinez (1969 274 CA2d 170, 174).

Further there is no evidence to indicate that any of their defendants were the persons responsible for the missing items. Certainly, none were found on their persons when they were arrested just shortly after the incident. In short, there is no evidence presented which would establish the necessary elements to constitute a robbery under Cal. Pen. Code Sec. 211. Thus, Petitioner should not have been convicted of violation of Cal. Pen. Code Sec. 211.

The same general argument holds true for the charge of assault with a deadly weapon. In fact, the only evidence connecting the Petitioner to the charges is Mr. Solis' identification at the show-up in

front of the bar, which has already been shown to have been conducted under circumstances that made it so impermissibly suggestive that it should be inadmissible as violation of Petitioner's due process rights.

To conclude that it was the Petitioner herein who assaulted Mr. Solis or who took Mr. Solis' missing property would be pure speculation and conjecture. It is the duty of the magistrate, the trial court and the appellate court to review, "...to discard - as unreasonable - inferences which derive their substance from guess work, speculation and conjecture." Birt v. Superior Court (1973) 34 CA3d 934, 938.

Even assuming that the People met their burden in establishing the elements of robbery or assault, one is left with the problems that the only way that Petitioner herein could be connected to the above would be by the previously discussed tainted identification. As such, the connection

would be the tainted "fruit of the poisonous tree" and therefore inadmissible evidence. Wong v. U.S. (1963) 371 U.S. 471; 83 S.Ct. 407.

III

A NEW TRIAL SHOULD BE GRANTED WHEN THE VERDICT RENDERED IS INCONSISTENT AND NOT SUPPORTED BY THE FACTS.

The verdict as rendered on the separate defendants is so contradictory in the findings that if one is legally correct, the other cannot be so. People v. Horowitz (1933) 131 CA.Supp. 791, 793. The Prosecution's case was based on the testimony of Jesse Solis, who testified that he identified all three defendants at the "show-up" conducted by the police officers in front of the Rancho Bar. However, the witness was unable, at anytime, to describe any facial features of Petitioner herein. The witness identified the Petitioner and Joe Solis as members of the group that was by his van. Joe Solis, co-defendant, testified

that he was not present at the crime and that he did not leave the bar together with Petitioner all evening, until they left to go home. Joe Solis was found not guilty. Petitioner was found guilty. The verdict is inconsistent and not supported by the facts.

It is difficult to perceive that the evidence presented, supported any verdict of guilty, but, to find guilt as to Petitioner and no guilt as to his co-defendant is a clear indication that the inconsistency is either a disregard of the law, a compromise, or an exercise of power which the jury has no right to exercise. Dunn v.United States 931) 284 U.S. 390; People v.Smith (1931) 117 CA 530,543; 12 S.C. L.Rev. 3166.

IV

MOTION FOR A NEW TRIAL SHOULD BE GRANTED WHEN THE VERDICT HAS BEEN DECIDED "BY ANY MEANS OTHER THAN THE FAIR EXPRESSION OF OPINION ON THE PART OF ALL THE JURORS." Cal. Pen. Code Sec. 1181(4).

There is a general rule against impeachment of a jury verdict. However, where a verdict is good on its face, but the jury were guilty of misconduct in arriving at it, this is grounds for a new trial or reversal on appeal if it can be proven. The method of proof, however, is sharply restricted. The jurors themselves, the best informed witnesses, are precluded from giving evidence of its invalidity. This rule against "impeachment of verdict" applies in both civil and criminal cases, and has been justified as necessary for their preservation of the secrecy of deliberations and for protection of the verdict against attacks corruptly induced. (Citations), Witkin, Cal. Crim. Proc. Sec. 553.

However, the rule precludes evidence of misconduct as a juror. But it does not apply where a prospective juror conceals bias or other disqualification in his voir dire examination, and this can be shown by juror's affidavits. (See People v. Castaldia

(1959) 51 C2d 569,572,335P2d 104; 2 Cal. Proc., Trial Sec. 99; 13 A.L.R.2d. Another exception to the rule is that a new trial may be granted, "when the verdict has been decided by lot, or by any means other than a fair expression of opinion on the part of all the jurors." Cal. Pen. Code Sec. 1181(4). This ground may be shown, both in civil and criminal cases, by affidavits of jurors. (See Cal. Proc. Trial Sec. 100; 13 Hastings L.J. 441, 445).

In People v. Hutchinson (1969) 71 C2d 342; 78 C.R. 196, the old rule was abrogated and the court made impeachment permissible under certain conditions. In that case, defendant was convicted of possession of marijuana. He moved for a new trial, offering a juror's affidavit reciting threats by the bailiff that the jury would be locked up for the night unless they reached a verdict. The juror averred that the repeated remarks and the tone of their utterance hurried the jury

and resulted in a compromise verdict. Held, conviction reversed; the affidavit was admissible, and the misconduct of the baliff was reversible error.

Tracing the history, the court said, the no impeachment rule was announced without precedence in an English case in 1785. It was subsequently adopted by American courts and has been the California rule since the first volume of our reports. (71 C2d 347). The statutory exception was enacted in 1862, and judicial exceptions were later recognized, but the rule itself was not codified and rests solely on stare decisis and policy considerations. (71 C2d 348).

The rule has been criticized. Commentators almost unanimously disapprove of the rule (71 C2d 347, Footnote 2), and the current theory of balancing of conflicting policies cannot withstand analysis "We have concluded that there is no substantial conflict of policies and that

the wrong to the individual cannot be considered the lesser of two evils." (71 C2d 349).

The court then announced a new rule. The proper distinction recognized by Cal. Ev. Code Sec. 1150(a); is between "proof of overt acts, objectively ascertainable." and "proof of the subjective reasoning processes of the individual juror." The latter can be neither corroborated nor disproved, and are excluded. But improper influences can be proved when they are "open to sight, hearing, and the other senses and thus subject of corroboration." (71 C2d 349).

Admission of juror's affidavits within the limits of Cal. Ev. Code Sec. 1150, supra, "protects the stability of verdicts, and allows proof by the best evidence of misconduct on the part of either jurors or third parties that should be exposed, misconduct upon which no verdict should be based." And admission should have "a

further prophylactic effect" of stripping from all prejudicial misconduct whatever veil of post-verdict secrecy is reserved for proper deliberations of the jury. (71 C2d 350).

Herein, during voir dire, juror Barbara Tallman, No. 7, responded that: no[she knew of no reason why she couldn't make a fair and impartial juror] (Rt 255; 20-22); yes, [that she would give the benefit of her individual opinion to each individual defendant] (RT 261; 3-5); yes [That she can give both sides a fair trial] (RT 264; 7); no [that nothing bothers her] (RT 264; 13-14); yes [that each defendant should receive her individual opinion and attention and can keep an open mind and listen to both sides] (RT 265; 17-26, RT266; 1-3); yes [weigh and balance both sides]; yes [join in the discussion with the other eleven, and be able to disagree with them] (RT 266; 4-16); no [to feelings that she should vote with the majority] (RT

266; 17-19); yes [be a fair juror] (RT 268; 4-6); no, none whatsoever [any reason that she shouldn't sit on the jury] (RT 268; 7-19); yes [she can come back with a not guilty verdict if, after all is said and done she has a reasonable doubt] (RT 271; 12-18).

The thrust of Petitioner's arguments herein is two-pronged. First, that during voir dire, Juror Tallman give false answers For instance, in her Declaration she states that after her separation from her husband she was unable to assert herself or stand up for herself. This was concealment of a disqualification before she became a juror. Thus, it can be shown by affidavit or declaration as annunciated in People v. Castaldia (1959) 51 C2d 569, 572.

The second prong, Petitioner contends is that the Declarations are proof of the overt acts of giving untrue answers on voir dire and that the entire matter can be further corroborated by Dr. Schearer her

psychiatrist. Therefore the Declaration is also admissible under Cal. Ev. Code Sec. 1150 because the matter stated in the Declaration can also be objectively ascertained by supplementing the record with a declaration from Dr. Schearer. Thus, it also complies with the new rule and test enunciated in Hutchinson. Therefore the Declaration is admissible in either of these two ways and this misconduct of this juror constitutes reversible error in that it constitutes denial of right to fair expression of opinion of all the jurors and therefore denial of Petitioner's fundamental Sixth Amendment right to trial by jury. Even though a state has discretion with regard to the detailed operation of its jury system it is still bound by the fundamental requirement that a criminal trial must be held before a fair tribunal - a rule that applies as well to the jury as to the judge Foy v. New York (1947) 332 U.S. 261, 288.

V

MOTION FOR A NEW TRIAL SHOULD BE GRANTED "WHEN THE JURY HAS...BEEN GUILTY OF ANY MISCONDUCT BY WHICH A FAIR AND DUE CONSIDERATION OF THE CASE HAS BEEN PREVENTED." Cal. Pen. Code Sec. 1181(3)

In Galloway, on motion for a new trial under Cal. Pen. Code Sec. 1181(3), defendant submitted to the trial court affidavits reflecting a pre-existing state of mind of "guilty" in one of the jurors, therefore bias. The Supreme Court traced the evolution of decisions under Cal. Pen. Code Sec. 1181(3) and concluded, beginning at P91. "We think that People v. Fair supra [the old rule], omits the recognition of a well-defined distinction which exists between a case where a juror was not interrogated upon the subject, or where he admitted his bias and expressed the belief that he could lay it aside, and a case where a juror concealed his prejudiced state of mind when examined on his voir dire and

entered upon the discharge of his duty as such juror while in such mental condition. In the second instance, actual bias becomes, where concealed, positive misconduct and continues to be such throughout such juror's service on the case, and if such misconduct is not known to the accused until after the trial and verdict, we see no reason whatsoever why the court should not have power to grant to the accused, a new trial, basing it upon said subdivision three of Section 1181 of the Cal. Pen. Code. To use as illustration an extreme situation; suppose a juror had been actually corrupted; had corruptly agreed to vote for a verdict of guilty regardless of the evidence; had concealed this fact on his voir dire examination and had served as a juror, the facts respecting the situation being unknown to the accused during the trial and only discovered after verdict. Can it be said for a moment that a trial court would be without power to

grant a new trial? People v. Galloway (1927) 202 Cal. 81, 91.

The distinction herein is that Galloway dealt with misconduct consisting of a juror's concealment of bias, whereas, in the instant case, Juror No. 7's misconduct consists of concealment of grounds for challenge and incompetence. But, the cases are not distinguishable because the effects are the same. In both situations, a new trial should be granted because "a juror has been guilty of misconduct by which a fair and due consideration of the case has been prevented." Juror No. 7's Declaration reveals that she knew that she could not assert herself and her responses concealed that she was mentally afflicted and thus, that there were grounds for challenge. This, in direct contravention to the Cal.Pen. Code. and to the right to unbiased and unprejudiced jurors which is an inseparable and inalienable part of the right to trial by jury guaranteed by the

State and by the Federal Constitutions Sixth Amendment right to trial by jury and Fifth and Fourteenth Amendments' Due Process clauses' rights to a fair trial by an impartial jury.

VI

DENIAL OF RIGHT TO REASONABLY EXERCISE A PEREMPTORY CHALLENGE, WHETHER BY THE TRIAL COURT OR THROUGH CONCEALMENT OF MATERIAL FACTS BY A JUROR IS THE DEPRIVATION OF AN ABSOLUTE AND SUBSTANTIAL RIGHT DESIGNED AS ONE CHIEF SAFEGUARD AGAINST AN UNLAWFUL CONVICTION.

In People v. Diaz (1984) 152 Cal. App.3d 926, 933, the defendant was charged with assault with a deadly weapon and was tried by jury. During the trial, the trial court learned from the court personnel that a juror had stated that she had been feloniously assaulted during an attempted rape at some time in the past. The juror had not disclosed such information during voir dire questioning.

The court said "the denial of the right to reasonably exercise a peremptory challenge, be it by either the trial court or a juror through concealing material facts, is not a mere matter of procedure, but the deprivation of an absolute and substantial right historically designed as one of the chief safeguards of a defendant against an unlawful conviction. "Experience has shown that one of the most effective means to free the jury box from persons unfit to be there is the exercise of the peremptory challenge. The right may not be abridged or denied, arbitrary abridgement or denial of the right runs counter to principles vital to the integrity and maintenance of the system of a constitutional right of trial by jury."

"The right of unbiased and unprejudiced jurors is an inseparable and inalienable part of the right to trial by jury guaranteed by the Constitution." Weathers v. Kaiser Foundation Hospitals

(1971) 5 Cal.3d 98, 110 [95 Cal.Rptr. 516; 485 P2d 1132] quoting People v.Galloway, supra, 202 Cal. 81, 92; People v.Wheeler (1978) 22 Cal.3d 258, 265.

Just a quick glance at Juror No. 7's declaration reveals that had the trial attorney known this lady's problems, he would have made not a peremptory challenge, but a challenge for cause.

Whereas in this case, the defense has examined the jurors concerning their qualifications and one of them failed to respond truthfully, as in the instant case, "it is manifest that he [has been] deprived of his right to challenge for cause, and [has been] deceived into foregoing his right of peremptory challenge." People v. Galloway (1927) 202 Cal. 81, 94. Any particular manner in which a jury is impeached which "prevents or embarasses the full unrestricted exercise by the accused of that right must be condemned." Pointed v. U.S. (1894) 151 U.S. 396, 408; 38 L.Ed.

208, 214 .

Appellant herein contends that Juror Tallman's Declaration reflects that she knew that she had mental problems and that she could not assert herself. During the trial attorney's voir dire questions (some setforth in Point IV) she should have disclosed the above and she did not. This was misconduct by which a fair and due consideration of the case has been prevented and constitutes a "deprivation of an absolute and substantial right of unbiased and unprejudiced jurors" which "is an inseparable and inalienable part of the right to trial by jury guaranteed by the Constitution".

VII

THE RIGHT TO A TRIAL BEFORE MENTALLY COMPETENT JURORS IS A FUNDAMENTAL AS THE RIGHT TO A TRIAL BEFORE UNBIASED AND UNPREJUDICED JURORS.

In Church v. Capital Freight Lines (1956) 141 CA2d 246, plaintiffs appealed

that they were denied the right to a trial before twelve competent persons in that the foreman of the jury was incompetent at the time of the trial. In that case, plaintiffs found out that eleven days after the verdict was rendered, the foreman's wife petitioned to have him declared mentally ill and seven days later he was so found and committed to a hospital. With their motion for a new trial, the plaintiffs filed affidavits by other jurors and by one of the doctors that had been appointed to examine the foreman prior to his commitment. The opposition also filed affidavits. In the end, the court found that the evidence did not establish that the foreman had been incompetent at the time of the trial. Nevertheless, the court said, "although we have been referred to no cases in this state directly on point, surely there can be no question but that the right to a trial before mentally competent jurors is as fundamental as a right to trial before unbiased and unprejudiced jurors which

our courts have held to be an inseparable and inalienable part of the right to trial by jury guaranteed by the Constitution." People v. Galloway, 202 Cal. 81, 92 [259 P.332].

"Contrary to defendant's argument, the very nature of the affliction would preclude the application of any rule predicated upon rationalization such as the intentional or unintentional failure to disclose one's disqualification. Therefore, in the present case, the court properly considered the affidavits of the jurors, not for the purpose of impeaching the verdict, but to assist it in determining the qualifications of Sindel to serve as a juror. See Shipley v. Permanente Hospital, 127 Cal.App.2d 417 [274 P.2d 53]."

Thus, assuming arguendo that notwithstanding the previous points and arguments that this court would find that the declaration of Juror No. 7 is not admissible to impeach the verdict, then it can certainly be considered in making a determination as

to Juror No. 7's mental competence. In this particular regard, we must keep in mind that unlike in Church, in the instant case , Juror No. 7's particular mental condition had already been diagnosed as being there way before she reported for jury duty, and that her particular mental condition directly affected her duties as a juror (See the declaration); i.e., she could not, and did not, give Petitioner the required benefit of her individual opinion, and she could not assert herself. Competent in this context has to be defined as competent to discharge the duties of a juror and if she could not assert herself she could not discharge her duties and therefore she was not competent and the right to trial before mentally competent jurors in an inseparable and inalienable part of the right to trial by jury guaranteed by the Constitution.

VIII

THE CONSTITUTION GUARANTEES THE FUNDAMENTAL RIGHT TO A UNANIMOUS JURY VERDICT AND

ACQUIESCENCE WITH THE MAJORITY IS NOT AN INDEPENDANT JUDGMENT AND UNDERMINES THE RIGHT TO UNANIMOUS VERDICT.

In People v. Superior Court (1968) 67 C2d 929, the People petitioned and were denied, a Writ of Mandate to compel the trial court to vacate an order for mistrial which was made where on polling the jury, one o f the jurors equivocated and finally said "I went along with the majority." In its analysis, the court said the "Constitution guarantees the fundamental right to a unanimous jury verdict. Cal. Const., Art.1, Sec. 7. Unanimity obviously requires that each juror must vote for and acquiesce in the verdict. Acquiescence simply because the verdict has been reached by the majority is not an independent judgment, and if permitted, would undermine the right to a unanimous verdict. Of People v. Wilt, 173 Cal. 477, 486, [160 P.561]; People v. Baumgartner, 166 Cal.App.2d 103, 107, 108 [332 P.2d 366].

Juror No. 7's declaration reflects that she had psychological problems (i.e. inability to assert herself or be individualistic) before she went into jury duty, she began to feel the unbearable pressure right after they went into deliberations (See the declaration at Paragraph 7); as the deliberations continued, her mental incompetence did not permit her to maintain her position that there was not sufficient [evidence] of identification, then she went along with the others just to stop the personal attacks. This is also corroborated by the inconsistent verdict of not guilty for Joe Solis, who testified that he and Petitioner did not leave the bar together (RT 1137). Shortly after this, the judge polled the jury. Is it conceivable that this lady, with her type of problems, and after not being able to assert herself with the jury, would be able to assert herself in front of the robed judge behind the elevated bench? The answer, of course, is "no".

Thus, because this juror's admitted simple acquiescence to the majority is not a unanimous verdict, Petitioner was denied his California constitutional right to a unanimous verdict. Further, to permit the verdict to stand, with the juror's admitted simple acquiescence would be a denial of Equal Protection of the California law that requires unanimous verdicts.

CONCLUSION

It is submitted for this Honorable Court's decision that any one of the issues raised is sufficient to reverse this conviction.

First, the Fourth and Fourteenth Amendment Due Process violation raised by the identification. The victim was in a dark van, in a dark lot, and was traumatically awakened in the middle of the night; in a fleeting moment, through a peephole, claimed he saw some "bikers" and some items of clothing, but didn't give physical descriptions; and, while in a highly

emotional state, was taken to identify someone.

Then, the group of people that had been stopped only because they fit someone's definition of "bikers", who were placed in a highly impermissibly suggestive scenario by being next to motorcycles with the lights on them.

With all of these pernicious elements, the victim identified Petitioner, and on question of how he knew it was him, told the officer; by the hat, the emblem, and the deep voice. But the emblem was a Harley Davidson logo and not "Hells Angels", as the victim had previously said; ad the victim had not heard Petitioner's voice at the show-up. He could not have matched the voice. With this scenario, as the United States Supreme Court has said, "the likelihood for mis-identification is the real Due Process issue".

Second, the evidence presented by the People did not establish the elements of the offenses charged, and the first issue,

combined with this one, is probably what led to the third problem, to-wit, an inconsistent verdict.

The juror's non-disclosure of disqualifications during voir dire give rise to other denials of rights.

First, because of the non-disclosure, she was not challenged and remained, but during deliberations, she did not assert her opinion of non-guilt and thus, the verdict is not the fair expression of all the jurors.

Second, her concealment constitutes positive misconduct.

Third, her concealment constitutes denial of the absolute and substantial right to exercise challenges.

Fourth, her being left on the jury because of her concealment led to denial of the fundamental right to trial before competent jurors.

Fifth, her declaration, that at trial and deliberations and after trial, she opined that there was no evidence to convict had

her concealment of her inability to assert herself, led to a denial of the constitutional, fundamental right to a unanimous verdict.

The Petition for Writ of Certiorari should be granted.

Dated: 5/28/86

Respectfully submitted,

LUIS R. PALACIOS, Esq.
Attorney for Petitioner

APPENDIX i

NOT FOR PUBLICATION

COURT OF APPEAL, FOURTH DISTRICT

DIVISION TWO

STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff & Respondent, v. SANTOS CARRION, Defendant & Appellant.	E001105 (Super.Ct. No.SCR-40647) OPINION

Appeal from the Superior Court of San Bernardino County. Fenton Jones, Judge. (Retired judge of the Superior Court sitting under assignment by the Chairperson of the Judicial Council.)

Affirmed.

Luis R. Palacios for Defendant and Appellant.

John K. Van de Kamp, Attorney General, Robert M. Foster, Keith 1. Motley and Rudolf Corona, Jr., Deputy Attorneys

General, for Plaintiff and Respondent.

Santos Carrion, defendant, appeals his conviction of assault by means of force likely to produce great bodily injury (Pen. Code, Sec. 245, subd. (a)), robbery (Pen. Code, Sec. 211), and a finding the deadly weapon use allegation was true (Pen. Code, Sec. 12022, subd. (b)).

Defendant contends on appeal: (1) his due process rights were violated by an impermissibly suggestive identification procedure which gave rise to a likelihood of irreparable misidentification; (2) insufficient evidence exists to support the verdict; (3) the verdict is inconsistent with that rendered in favor of Joe Solis, a second defendant; (4) the verdict was rendered by means other than the fair expression of opinion on the part of all jurors; (5) a new trial should be granted due to jury misconduct;

(6) he was denied the right to exercise a peremptory challenge due to a juror's concealment of material facts; (7) he was denied a fair trial due to a juror's mental incompetence; and (8) a juror's acquiescence in the majority view denied him his right to a unanimous jury verdict.

FACTS

On June 24, 1983, Jesse Solis1/ was sleeping in his van, which was parked in a Colton shopping center parking lot. Solis had gone to sleep at 9:30 p.m. He was awakened after midnight by the sound of someone yanking and pushing the van's back door and shouting at him to "open

---

1/All references to "Solis" in this opinion are to Jesse Solis, the victim. One of the defendants at trial was named Joe Solis. He is not related to the victim.

up." He was told if he did not open the van, the gas tank would be lit with a match. Solis moved a rear window curtain and saw nine or ten people congregated around the van. Defendant was identified as the person making the threats. Defendant was wearing a jacket and cap. Solis looked through two side door windows and saw two other individuals crouched beside the van. One was identified as Leonard Herrera; he was also convicted for robbery. The other was tentatively identified as Joe Solis; he was acquitted.

After a few minutes, defendant managed to open the back door and entered, armed with a knife. Solis escaped through a side door and ran to a nearby store, from where the police were called. When the police arrived, Solis explained that he had been robbed by a group of bikers, and

pointed out such a group standing outside a nearby bar. The bar was approximately one-half block away. Solis was escorted to the bar by the police, where he identified defendant, Joe Solis and Leonard Herrera. Defendant was initially identified by his cap, jacket and knife.

Upon returning to his van, Solis found many items strewn around the van and tarmac. He determined that several items were missing, including a wallet, a gold ring, and a radio/cassette recorder. These items were not found on the defendant.

I

IMPERMISSIBLY SUGGESTIVE IDENTIFICATION PROCEDURE

Defendant asserts that Solis' in-the-field identification was impermissibly suggestive, requiring automatic reversal.

2/ As noted in People v. Craig (1978) 86 Cal.App.3d 905, 913, the propriety of this procedure has been repeatedly upheld. (See People v. Rodriguez (1970) 10 Cal.App.3d 18, 29-30; People v. Anthony (1970) 7 Cal.App.3d 751, 764-765; People v. Levine (1969) 276 Cal.App.2d 206, 208; People v. Colgain (1969) 276 Cal.App.2d 118, 125-127.)

The rationale for this rule is as follows:

"The potential unfairness in such suggestiveness, however, is offset by the likelihood that a prompt identification within a short time after the commission of the crime will be more accurate than a belated identification days or weeks later. Furthermore,

---

2/As defendant failed to raise this argument by objection or motion to strike at trial, he is precluded from asserting it on appeal. (People v. Torres (1971) 19 Cal.App.3d 724, 732.) Upon analysis, the outcome is the same.

because the problem is inherent in such confrontations, the choice is between prohibiting all in-the-field identifications or permitting them notwithstanding the element of suggestiveness. The choice involves a balancing of the interests of fairness to criminally accused persons and prompt, proper and efficient law enforcement, and the choice has properly been made to permit in-the-field identifications, because the immediate knowledge whether or not the correct person has been apprehended is of overriding importance and service to law enforcement, the public and the criminal suspect himself. (Citations.)" (People v. Anthony, supra, 7 Cal.App.3d at pp. 764-765.)

Where the accused claims the pretrial identification was impermissibly suggestive, he has the burden of showing

it likely resulted in irreparable misidentification. (People v. Craig, supra, 86 Cal.App.3d at p. 913.) There is no substantial likelihood in the present case. (1) Solis' in-the-field identification of defendant took place shortly after his van had been broken into. (2) Prior to his identifying defendant at the bar, Solis had been admonished by a police officer that the persons detained may not have committed the crime.3/ (3) When Solis was trapped in his van, he had looked at defendant's face. (4) Solis' attention had been drawn to defendant because defendant was verbally threatening him. (5) Solis recognized defendant's

3/"You should not consider that the persons being detained who may or may not be handcuffed are the persons who committed the crime. You are not obligated to identify anyone. It is just as important to free innocent persons from suspicion as to identify guilty parties. Please do not discuss this case with any witnesses nor indicate in any way that you have or have not identified someone."

cap and jacket. (6) Solis had been threatened by an intruder armed with a knife. After defendant had been taken into custody, Solis positively identified the knife possessed by defendant. (7) Although defendant was standing with two other individuals during the in-the-field identification, Solis only identified defendant and one of the robbery. The third individual, also wearing Amigos "colors," was released. (8) Several other individuals were congregated in front of the bar, none of whom were identified by Solis. (9) Solis displayed certainty when identifying the robbery participants. (10) Solis made an in-court identification of defendant.

Given these factors, it is clear there was no substantial likelihood of misidentification. Defendant has not been denied his right to due process.

II

SUFFICIENCY OF EVIDENCE

Penal Code Section 211 defines robbery as "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." Defendant claims that the trial court committed two errors in finding him in violation of this Penal Code section: (1) "(T)here is nothing in the evidence to show that any property of Mr. Jesse Solis was taken from his person or from his immediate presence."; and (2) There was insufficient evidence to indicate defendant took the victim's property.

The meaning of the phrase "immediate presence" was explored in People v. Risenhoover (1968) 70 Cal.2d 39, 50, and was liberally construed. The Court held

"'"(p)resence depends upon the circumstances of each case and implies an area with no metes and bounds"' and 'immediate' has been defined as '"(b)eing near at hand; not far apart or distant."'" (Id.) Subsequently, courts have added that the act of robbery is deemed to have occurred in the victim's presence as long as the victim perceived any overt act connected with the commission of the offense. (People v. Miramon (1983) 140 Cal.App.3d 118, 124.)

The case at bar clearly falls within the ambit of the above rules. Solis escaped from his van as defendant entered, brandishing a knife. Upon his return to his van, the victim noted many items of personal property were missing. Defendant's breaking into the van was an overt act in commission of the robbery; Solis' "immediate presence" is

thereby established.

Defendant also argues there is insufficient evidence defendant took any property of the victim. Defendant's contention fails. As noted in People v. Mosher (1969) 1 Cal.3d 379, 395, on appeal, evidence must be viewed in a light most favorable to respondent and circumstantial evidence may be relied upon to connect the defendant with the commission of the crime charged and to establish beyond a reasonable doubt he committed it. The Mosher court concluded: "If the circumstances reasonably justify the trial court's finding, an appellate court cannot reverse merely because the circumstances might also be reasonably reconciled with a contrary finding." (Id.)

The jury reasonably concluded that defendant took Solis' property. They

drew this inference from defendant's breaking into the victim's van and the subsequent disappearance of the victim's property. We will not disturb this finding.

III

INCONSISTENT VERDICTS

Defendant next asserts the jury verdicts are inconsistent and a new trial is therefore mandated. He bases this contention on a second defendant's Joe Solis', acquittal. Defendant's brief states Joe Solis was with him during the entire evening. Defendant is wrong.

Numerous reasons exist for the different jury verdicts. As Joe Solis' attorney suggested, Joe Solis' guilt, if any, would have been based on a theory of aiding and abetting. Defendant's liability was that of a

principal's. Witness' testimony about the two defendants differed, as did the evidence and identification. Further, the record does not indicate defendant Solis was with defendant Carrion the entire evening. It merely reflects defendant Solis and defendant Carrion never left the bar together, prior to their going home. The record does not state defendant Carrion never left the bar.

IV

JUROR MISCONDUCT

Defendant next asserts his motion for new trial should be granted based on misconduct by juror Barbara Tallman. Several different arguments are mustered to support his claim. None has merit.

Defendant's motion is based on a declaration of juror Tallman. Tallman's declaration reveals on three occasions

prior to the trial, she had seen a psychologist for emotional problems arising from her separation with her husband. Due to these problems, Tallman felt unable to withstand pressure from the other jurors and voted for a guilty verdict, even though she did not believe there was sufficient identification to yield a conviction.

Defendant first claims that Tallman's declaration admits to giving false answers during voir dire. Not so. Tallman's declaration indicates she answered the questions to the best of her ability. She recognized the extent of her later perceived problem only after jury selection. Tallman indicated: "If I had known during questioning what would happen in the jury room I would have told the court I was not capable of handling the pressure." The declaration

does not reveal false answers.

Defendant contends the verdict is not the fair expression of all jurors, thus requiring reversal. He bases this contention on Tallman's subjective statements which indicate her conflict with the other jurors. Defendant illogically tries to convert Tallman's subjective rationale for a guilty vote into an objective standard by psychiatric measurement. Defendant is legally and medically wrong. As explained in People v. Sutter (1982) 134 Cal.App.3d 806,819, juror affidavits are admissible to impeach a jury verdict, however, a verdict may not be impeached by inquiry into the juror's mental or subjective reasoning process, and evidence of what the juror "felt" is not competent. (People v. Hutchinson (1969) 71 Ca.2d 342, 350-351; People v. Elkins (1981) 123 Cal.App.3d

632, 636-637; People v. Flores (1979) 92 Cal.App.3d 461, 468-469; Evid. Code, Sec. 1150, Subd. (a).)

People v. Flores, supra, 92 Cal.App.3d 461, further notes at page 468: "(T)he only improper influences that may be proved under section 1150 to impeach a verdict are those open to sight, hearing, and the other senses and are thus subject to corroboration. (People v. Hutchinson, supra, 71 Ca.2d at p. 350.) It was with this limitation clearly expressed that the court held in Hutchinson that 'jurors are competent witnesses to prove objective facts to impeach a verdict under section 1150 of the Evidence Code.' (Id., at p. 351.) The limitation of impeachment evidence to proof of overt conduct, conditions, events, and statements 'prevent one juror from upsetting a verdict of the whole jury by impugning

his own or his fellow jurors' mental processes or reasons for assent or dissent.' (Id., at p. 350.)"

In the present case, the affidavit relied upon by defendant is inadmissible under the Hutchinson standards. The affidavit refers to what Tallman "felt " and to her subjective reasoning process. Subjective reasoning is not capable of "objective" verification by a psychiatrist.

Defendant next asserts that Tallman's failure to reveal, during voir dire, her emotional difficulties is analogous to concealing bias or misconduct. We disagree. Tallman's emotional problems do not render her "mentally afflicted," and her failure to alert the attorneys and judge during voir dire does not constitute "misconduct." Tallman concealed nothing because, at the time, she did not

know her recent separation could possibly affect her performance as a juror. She had served on a prior jury and felt confident of her ability. Finally, she did not consider her visits to her psychologist important.

Defendant's reliance upon People v. Diaz (1984) 152 Cal.App.3d 926, is inapposite. In Diaz, the jury panel was asked whether anyone on the panel had been assaulted with force likely to produce great bodily injury. The reticent juror did not respond, even though she had been such a victim. She denied knowing anything in her background which would cause another juror to be selected in her place. She also stated she had heard the questions asked of other jurors, and denied her answers would be different than theirs.

The Diaz court ruled the juror's

actions constituted prejudicial concealment, and provided the following analysis: "(W)here, as here, a prospective juror in a criminal case fails to respond to a relevant, direct and unambiguous question presented by defendant counsel in voir dire, although having knowledge of the information sought to be elicited, the trial court should, upon motion for a new trial, determine whether the question propounded to the juror was (1) relevant to the voir dire examination; (2) whether it was unambiguous; and (3) whether the juror had substantial knowledge of the information to be elicited. If the trial court's determination of these inquiries is in the affirmative, the court should then determine if prejudice to the defendant in selecting the jury reasonably could be inferred from the juror's failure to

respond. If prejudice reasonably could be inferred, then a new trial should be ordered." (Id., at p. 935.)

As stated above, Tallman answered the questions on voir dire honestly and to the best of her ability. She was not asked whether she was seeing a psychologist. Tallman's failure to volunteer personal problems does not meet the concealment standards set out in Diaz. Defendant was not denied the right to exercise a peremptory challenge due to a juror's concealment of material fact.

Defendant properly asserts that a new trial may be granted if a juror is not mentally competent during the original trial. Affidavits may be considered in determining the qualifications of the individual to serve as a juror. The affidavits must overcome a presumption of

sanity and the party asserting insanity at a particular time has the burden of establishing it by a preponderance of the evidence. (Church v. Capital Freight Lines (1956) 141 Cal.App.2d 246, 248-249) Defendant has failed to meet this burden.

Finally, defendant asserts Tallman's acquiescence in the verdict deprived him of a unanimous jury verdict. (People v. Superior Court (1967) 67 Cal.2d 929, 932.) In Superior Court, the judge polled the jury and found that one juror "went with the majority." (Id., at p. 931.) The court declared a mistrial.

In the case at bench, Tallman was polled by the judge and she affirmed her guilty vote. No misgivings were stated. Her later declaration, indicates buyer's remorse and provides her subjective reasoning process. Tallman cannot overturn

the verdict by impugning her own mental processes.

Judgment affirmed.

NOT FOR PUBLICATION

Rickles
J.

We concur:

Morris
P. J.

McDaniel
J.

APPENDIX ii

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

4TH DISTRICT, DIVISION 2, NO. E001105

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

PEOPLE

v.

SANTOS CARRION

Appellant's Petition for Review

DENIED

APPENDIX iv

THE FOURTH, FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION PROVIDE IN RELEVANT PARTS:

ARTICLE (IV.)

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated....

ARTICLE (V.)

No person shall...be deprived of life, liberty, or property, without due process of law;....

ARTICLE (VI.)

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury....

ARTICLE (XIV.)

Section 1. ...nor shall any State

deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

ARTICLE I, SECTIONS 7, 13, 15, AND 16 OF THE CALIFORNIA CONSTITUTION PROVIDE IN RELEVANT PART:

Section 7. (a) A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws;....

Section 13. The right of the people to be secure in their persons, houses, papers, and effects against unreasonable seizures and searches may not be violated;....

Section 15. The defendant in a criminal cause has the right to a speedy public trial....

Persons may not...be deprived of life, liberty, or property without due process of law.

Section 16. Trial by jury is an inviolate right and shall be secured to all, but in a civil cause three-fourths of the jury may render a verdict....

....

In criminal actions in which a felony is charged, the jury shall consist of 12 persons. ....

CALIFORNIA'S PENAL CODE SECTIONS 211, 245(a), 995(a) (2) (B), 1118.1, 1119, 1181(3) AND (4) AND (6), 12022 (b), PROVIDE IN RELEVANT PARTS:

Section 211. Robbery Defined.

Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.

Section 245. (Assault with deadly weapon or instrument.) (a) (1) Every person who commits an assault upon the person of another with a deadly weapon or instrument other than a firearm or by means of force likely to produce great bodily injury....

Section 995. (When...information must be set aside.) (a) Subject to subdivision (b) of Section 995a, the indictment or information shall be set aside by the court in which the defendant is arraigned, upon his or her motion, in either of the following cases:

....

(2) If it is an information:

(B) That the defendant had been committed without reasonable or probable cause.

Section 1118.1 (Jury case.) In a case tried before a jury, the court on motion, at the close of the evidence on either side and before the case is submitted to the jury for decision, shall order the entry of a judgment of acquittal of one or more of the offenses charged in the accusatory pleading if the evidence then before the court is insufficient to sustain a conviction of such offense or offenses on appeal....

Section 1119. (View of premises, etc., by jury: When ordered and how conducted: Communication with jury.) When, in the opinion of the court, it is proper that the jury should view the place in which the offense is charged to have been committed, or in which any other material fact occurred, or any personal property

which has been referred to in the evidence and cannot conveniently be brought into the courtroom, it may order the jury to be conducted in a body, in the custody of the sheriff, marshal or constable, as the case may be, to the place, or to such property, which may be, to the place, or to such property, which must be shown to them by a person appointed by the court for that purpose;....

Section 1181. (Grounds for new trial: ....) When a verdict has been rendered or a finding made against the defendant, the court may, upon his application, grant a new trial, in the following cases only:

1. ....

2. ....

3. When the jury has...been guilty of any misconduct by which a fair and due consideration of the case has been prevented;

4. When the verdict has been decided by lot, or by any means other than a fair expression of opinion on the part of all the jurors;

5. ....

6. When the verdict or finding is contrary to law or evidence....

Section 12022 ....

(b) Any person who personally uses a deadly or dangerous weapon in the commission or attempted commission of a felony shall, upon conviction of such felony or attempted felony, in addition and consecutive to the punishment prescribed for the felony or attempted

felony of which he has been convicted, be punished by an additional term of one year, unless use of a deadly or dangerous weapon is an element of the offense of which he was convicted.

....

CALIFORNIA'S EVIDENCE CODE SECTIONS 402, 403, 1150(a) PROVIDE IN RELEVANT PART:

> Section 402. Procedure for determining foundational and other preliminary facts. (a) When the existence of a preliminary fact is disputed, its existence or non-existence shall be determined as provided in this article.
>
> (b) The court may hear and determine the question of the admissibility of evidence out of the presence or hearing of the jury; ....
>
> Section 403. Determination of foundational and other preliminary

facts where relevancy, personal knowledge, or authenticity is disputed. (a) The proponent of the proffered evidence has the burden of producing evidence as to the existence of the preliminary fact, and the proffered evidence is inadmissible unless the court finds that there is evidence sufficient to sustain a finding of the existence of the preliminary fact, when:

(1) The relevance of the proffered evidence depends on the existence of the preliminary fact;

(2) The preliminary fact is the personal knowledge of a witness concerning the subject matter of his testimony;

(3) ....

(4) The proffered evidence is of a statement or other conduct of a

particular person and the preliminary fact is whether that person made the statement or so conducted himself.

....

Section 1150 Evidence to test a verdict. (a) Upon any inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined.

....